

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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AMERICAN OVERSIGHT,

CA No: 1:19-cv-02934-CRC

Plaintiff,

Washington, D.C.

Wednesday, October 23, 2019

vs.

1:07 p.m.

U.S. DEPARTMENT OF STATE,

Defendant.

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TRANSCRIPT OF MOTION HEARING  
HELD BEFORE THE HONORABLE CHRISTOPHER R. COOPER  
UNITED STATES DISTRICT JUDGE

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APPEARANCES:

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## P R O C E E D I N G S

THE COURTROOM DEPUTY: Your Honor, we're on the record for Civil Case 19-2934, *American Oversight vs. Department of State*.

Counsel, if you can please approach the lectern and identify yourselves for the record.

MR. McGRATH: Good afternoon, Your Honor; I'm Daniel McGrath here for American Oversight, and I'm joined by Sara Creighton and John Bies.

THE COURT: Mr. McGrath. Everyone, welcome.

MR. ABBUHL: Good afternoon, Your Honor; my name is Joshua Abbuhl, and with me is Elizabeth Shapiro and Elizabeth Loftus.

THE COURT: Mr. Abbuhl, how are you?

MR. ABBUHL: Thank you.

THE COURT: How's everyone?

Good.

Mr. Abbuhl, before we get to the motion, I saw that you filed a sur-reply this morning updating the Court on the progress of the search. Just so that we're all on the same page as to what's been done and the results of the preliminary search, could you explain a little more precisely the search efforts to date.

MR. ABBUHL: Yes, Your Honor.

THE COURT: And specifically, I don't understand

1 the distinction between a repository and a component.

2 MR. ABBUHL: Sure, Your Honor.

3 So starting with that question, both are locations  
4 where we will search for documents. A component, generally  
5 speaking, will be, for example, the Office of Legal Adviser  
6 systems or the Bureau of Near Eastern Affairs where a  
7 repository is something that can be searched centrally from  
8 a particular office to task out searches to the components.

9 THE COURT: Okay. As I understand the two  
10 requests, sort of the thrust of both are communications  
11 between or among -- or among or with certain State  
12 Department personnel and Mr. Giuliani, Ms. Toensing,  
13 Mr. diGenova, and wouldn't those communications, to the  
14 extent, at least, they're reflected in emails, be a central  
15 email system?

16 MR. ABBUHL: I believe, Your Honor, that many of  
17 the emails are automatically drawn into a central system but  
18 only, I believe, for either certain individuals or certain  
19 components, and I don't know the exact breakdown yet.

20 But what I can say is that, as we've laid out,  
21 we've done, you know, three of I think seven components for  
22 the first request and four -- or, excuse me -- there are 11  
23 requests of which some proportion of -- 11 components that  
24 are being searched in the second request, and we have  
25 already completed initial searches of some number of those.

1           THE COURT: But I guess my question is that when  
2           you say three of seven or four of 11 components have been  
3           searched, does there need to be a separate email search of  
4           each component, or can emails in the State Department be  
5           searched centrally? And has that -- have those searches  
6           been run for custodians listed in the request?

7           MR. ABBUHL: I believe that email searches have  
8           been run for some but not all -- I would want to double-  
9           check that, Your Honor --

10          THE COURT: Okay.

11          MR. ABBUHL: -- but I believe that some,  
12          essentially, proportion of what you were discussing has been  
13          run. And I do think that we've begun with the more -- the  
14          cases that -- excuse me, the documents that can be searched  
15          from a local server just because that's obviously the  
16          easiest to do rather than asking another person to gather  
17          the documents and send them back.

18          THE COURT: Okay.

19          Mr. McGrath, it's your motion.

20          MR. McGRATH: Thank you, Your Honor.

21          American Oversight here is seeking records of  
22          extraordinary public importance. These records are of such  
23          public importance that they concern matters that have led  
24          the House of Representatives to initiate an impeachment  
25          inquiry for one of the handful of times in our nation's

1 history. In particular, as Your Honor has acknowledged,  
2 they seek -- American Oversight's first request seeks  
3 communications with Rudy Giuliani and other reported  
4 personal attorneys to the President. Mr. Giuliani has been  
5 a central figure in reports about the alleged efforts to  
6 pressure the Ukrainian government to investigate a political  
7 opponent of the President. American Oversight's request  
8 also seeks communications about any other effort to pressure  
9 the Ukrainian government to initiate such an investigation.

10 And American Oversight's second request centers  
11 around former Ambassador Yovanovitch, who has testified in  
12 front of Congress and -- as a part of the impeachment  
13 inquiry and was recalled around the time that these reported  
14 efforts began.

15 So these records concern a matter of immense  
16 public importance, and American Oversight would disseminate  
17 them rapidly to the public to inform the public about the  
18 merits of potential impeachment here or the merits of the  
19 potential decision to remove the President from office,  
20 matters that are -- it would be hard to imagine a matter  
21 that would be more central to fulfilling the purpose of the  
22 FOIA to inform the citizenry so that they can petition their  
23 elected representatives to make important decisions in an  
24 informed manner.

25 Plaintiff believes that we are nearly certain

1 particular -- we are nearly certain to succeed on the merits  
2 of this case as State has not contested that American  
3 Oversight lawfully submitted these FOIA requests a little  
4 over five months ago, and American Oversight is almost  
5 undoubtedly entitled to determinations on those requests and  
6 production of nonexempt responsive records.

7 And as I was mentioning -- to what I was  
8 mentioning earlier --

9 THE COURT: Now, the government obviously frames  
10 the relief sought differently than you've just described.  
11 The government frames it as seeking a determination that it  
12 has not processed your expedited request as soon as is  
13 practicable --

14 MR. McGRATH: Uh-huh.

15 THE COURT: -- and that there is no evidence in  
16 the record that the department has failed to live up to that  
17 obligation because the request is still recent and the  
18 department is, I'm sure they will tell me, exercising due  
19 diligence to respond to the request consistent with its  
20 other FOIA obligations and other requests in matters that  
21 other plaintiffs view as urgent as well, including, at  
22 least -- and I'll ask the government about this -- you know,  
23 numerous other Ukraine-related requests.

24 Why is that not the correct way to frame the  
25 relief that you're seeking?

1           MR. McGRATH: Well, Your Honor, we have seen  
2 regularly and the case law shows that after the statutory  
3 limits imposed by the FOIA have passed, plaintiffs are  
4 entitled to seek judicial supervision, and really the  
5 question of what the date certain that Your Honor orders  
6 production by is really a question to our minds of what  
7 remedy is appropriate here.

8           It's absolutely routine in FOIA cases, where the  
9 parties cannot come to an agreement about a production  
10 schedule, for the Court to issue an order for production.  
11 And I think we have requested production by November 15th or  
12 such date as Your Honor believes is certain, but to the  
13 extent, also, that practicability concerns impact Your  
14 Honor's decision, we have submitted these requests well over  
15 five months ago. From our surveying of the public records  
16 available publicly of other requesters, many of them  
17 submitted requests for very similar subject matter only in  
18 late September of this year --

19           THE COURT: You think you're first in the Ukraine  
20 line, in other words?

21           MR. McGRATH: From what we've been able to see  
22 based on publicly available information.

23           But also we think that because we have requested  
24 records that are very central to the impeachment inquiry,  
25 that other requesters are likely seeking many of the same

1 records, and the State Department would be able to make  
2 those readily available to other requesters.

3 For example, communications between top State  
4 Department officials and Rudy Giuliani or concerning any  
5 effort to impact -- to encourage Ukraine to investigate a  
6 political opponent of the President, we think that those  
7 records are very likely to be responsive to many of the  
8 other Ukraine requesters.

9 THE COURT: Now, you're obviously here on a PI  
10 request.

11 MR. McGRATH: Uh-huh.

12 THE COURT: There's been a lot of ink spilled on  
13 the relationship between the preliminary injunction  
14 requirements and FOIA cases. I've written on that.  
15 Numerous other judges have. As I have gone back and read  
16 those cases, what's occurred to me is that, you know, are we  
17 just talking about sort of semantics here, right?

18 If the department had answered -- and I don't know  
19 when its answer deadline is.

20 MR. McGRATH: October 31st, I believe, Your Honor.

21 THE COURT: Okay, so next week.

22 -- or if I had ordered the department to answer by  
23 today, and we were here on the merits, I clearly would have  
24 supervisory authority to, you know, work with the parties on  
25 an appropriate production schedule. I do that all the time.



1 Judges in this court do it all the time.

2 Does it really matter what we call it? Is the  
3 relief that you're seeking available -- would the same  
4 relief be available on the merits?

5 MR. McGRATH: So I think there's two --

6 THE COURT: And why does the Court need to grapple  
7 with, you know, how to frame the violation in terms of  
8 likelihood of success on the merits for purposes of a  
9 preliminary injunction when I could exercise the same  
10 oversight responsibility in the normal course?

11 MR. McGRATH: Well, I think the overriding concern  
12 in this particular case and why plaintiff has filed a  
13 preliminary injunction motion is that, with the rapidly  
14 proceeding impeachment inquiry, the chance of irreparable  
15 harm in this case, if we wait for the Court to exercise  
16 supervision after the defendant's --

17 THE COURT: But I could take those same factors  
18 into account on the merits, correct?

19 MR. McGRATH: You could take the factor of...?

20 THE COURT: Of balancing the equities, how  
21 important it is for the documents to be disclosed consistent  
22 with the purposes of FOIA.

23 MR. McGRATH: Yes, because Your Honor can exercise  
24 the Court's equitable powers in that case as well. But here  
25 we are seeking the preliminary injunction because of the

1 great risk of irreparable harm if we do not have the Court's  
2 supervision.

3 We also -- to the extent that defendant has  
4 responded in both its sur-reply and in its opposition  
5 motion, it has not indicated that it intends to challenge  
6 the fact that American Oversight has submitted lawful FOIA  
7 requests and has indicated that it is undertaking search  
8 efforts.

9 THE COURT: Okay. Let's talk about irreparable  
10 harm.

11 The government makes the argument that many, if  
12 not most, of the materials that you've requested would be  
13 subject to valid exemptions; and, therefore, you're never  
14 going to get this stuff anyway so you're not being harmed by  
15 the delay attendant to their responding to your request. At  
16 least for some of the documents I think that's well-taken,  
17 right?

18 If there are classified materials -- for instance,  
19 you've asked for diplomatic cables which are typically  
20 classified -- why should I order State to take the time to  
21 search for materials and then litigate and redact or  
22 withhold and litigate the withholdings in the next month  
23 when it's not likely you're going to get that stuff anyway?  
24 And can we somehow identify materials that would not appear  
25 subject to withholdings?

1           For instance, you know, correspondence with a  
2           third party outside of the department. You know, I'll ask  
3           the government this, but it's not self-evident what  
4           exemptions might apply to those sort of materials. You  
5           know, can we, you know, narrow this request somehow and home  
6           in on the stuff that is less likely to be withheld or  
7           validly withheld and use the next 30 days a lot more  
8           productively to just having State, you know, boil the ocean  
9           for materials that are likely to be withheld pursuant to a  
10          valid exemption?

11           MR. McGRATH: To Your Honor's question, we  
12          believe, in particular, that the first aspect of American  
13          Oversight's first request seeks records reflecting  
14          communications with Mr. Giuliani and other reported personal  
15          attorneys of the President who have no official government  
16          position. We actually -- I believe we, as an organization,  
17          have requested, just to ensure that we're correct in making  
18          this assertion, any financial disclosures that Mr. Giuliani  
19          may have with the State Department in case he was a special  
20          government employee, for example, and received a response  
21          that they did not have any such records. We think that  
22          those communications and records reflecting those  
23          communications are very unlikely to be subject to  
24          significant exemption.

25                 And then there are other subsets of records here

1       that we think the segregable information will be extremely  
2       valuable to the public, particularly in determining whether  
3       the right people have been interviewed by Congress and  
4       whether Congress has heard from all of the witnesses with  
5       information about this matter. But we do believe that that  
6       first aspect of the first request is most likely to have the  
7       most substantive information disclosable.

8               THE COURT: And I take it you have not met and  
9       conferred with the department regarding what those  
10      categories might or might not be.

11             MR. McGRATH: We have not received significant  
12      information from the department.

13             THE COURT: Apart from correspondence with third  
14      parties outside the department, are there any other, you  
15      know, categories of requested materials that you believe are  
16      unlikely to be the subject of a valid withholding?

17             MR. McGRATH: I think that there are two other  
18      categories, Your Honor. One, the second aspect of the first  
19      request, which is in Paragraph 7 of plaintiff's complaint,  
20      seeks records reflecting communications about Mr. Giuliani  
21      or about any effort to encourage Ukraine to investigate a  
22      political opponent of the President. Within that request we  
23      have identified Secretary Pompeo and Counselor Brechbuhl,  
24      both of whom -- Secretary Pompeo has confirmed that he was  
25      on President Trump's July 25th call with the president of

1 Ukraine, and Counselor Brechbuhl was also reportedly on that  
2 call. We sought records reflecting communications,  
3 including handwritten notes and summaries of communications,  
4 and the President has ordered that the contents of that call  
5 be declassified and fully released to the public; and to the  
6 extent that those individuals were creating records that  
7 reflected the content of that call, it may be subject to  
8 public disclosure.

9 THE COURT: What's the authority for the  
10 proposition that declassification of a transcript waives  
11 assertion of any -- you know, the exemption -- what's the --  
12 Exemption 1.

13 MR. McGRATH: Yes, Exemption 1.

14 THE COURT: -- waives Exemption 1 with respect to  
15 any communications regarding that declassified document, in  
16 this case a transcript?

17 MR. McGRATH: So I think there would still be  
18 substantially -- there still could be communications about  
19 that call, surrounding that call, that would still be  
20 exempt, but to the extent that those notes or summaries of  
21 that call reflected the same information that has already  
22 been declassified, I don't have the case cite handy but  
23 official acknowledgement --

24 THE COURT: Official acknowledgement, okay.

25 MR. McGRATH: Yes. -- of those particular facts,

1 and to the extent that in these impeachment proceedings the  
2 administration may --

3 THE COURT: But if the same facts have been  
4 officially acknowledged, then I'm not -- that may undercut  
5 your irreparable harm argument.

6 MR. McGRATH: Well, on that particular case that  
7 may be true, but it is also possible and there are  
8 administration statements that may suggest -- I don't have  
9 them handy at this particular moment -- that perhaps the  
10 validity of that call -- while not initially challenged when  
11 officially acknowledged, the validity of the facts in that  
12 call memorandum could be challenged at a later date and  
13 substantiating documents that contain the same information  
14 could --

15 THE COURT: So correspondence regarding the  
16 President's call with the Ukrainian --

17 MR. McGRATH: To the extent that it was  
18 summarizing the content that's already been released.

19 There's a third category. We requested, in  
20 American Oversight's second request, Ambassador  
21 Yovanovitch's -- three items related to Ambassador  
22 Yovanovitch. One included communications between the White  
23 House and the State Department regarding her early recall  
24 from Ukraine. To the extent that there was a directive from  
25 the White House to the State Department recalling Ambassador

1 Yovanovitch, that she has been recalled is already public,  
2 and that would be a final directive that would not be  
3 deliberative or predecisional. And to the extent that that  
4 communication showed who made the decision to recall  
5 Ambassador Yovanovitch, that would inform the public in a  
6 manner that could --

7 THE COURT: Okay.

8 MR. McGRATH: -- explain whether someone should be  
9 questioned about this. That may include the content of the  
10 decision why that was made, whether that was made for a  
11 reason related to the effort to encourage Ukraine to  
12 investigate one of the President's opponents.

13 THE COURT: So discussions about the reasons for  
14 the decision --

15 MR. McGRATH: And if they follow --

16 THE COURT: -- whether to do it or not, that  
17 strikes me as subject to deliberative process privilege.

18 MR. McGRATH: Well, whether to do it or not would,  
19 but following the decision or reasons that they --

20 THE COURT: How to implement a decision already  
21 made.

22 MR. McGRATH: Yes. And also identifying the  
23 individuals involved in conveying that directive, if that  
24 directive occurred from the White House to the State  
25 Department, would identify individuals who the public could

1 under -- better understand whether those individuals should  
2 be interviewed or have information relevant to the  
3 impeachment inquiry.

4 THE COURT: Okay. Anything else?

5 MR. McGRATH: I would just stress that we also  
6 think here that the public interest weighs heavily in favor  
7 of disclosure for reasons that overlap with why there will  
8 be irreparable harm, and we'd emphasize that since the  
9 filing of the instant motion the impeachment inquiry has  
10 proceeded at a rapid pace with often more than one witness  
11 testifying per day to Congress, and we're relying on the  
12 statements of the congressional leaders with power over that  
13 inquiry as to the time that we've requested production by.

14 To the extent Your Honor has practicability  
15 concerns, we are more than willing to confer with State and  
16 narrow, perhaps, to the documents that we think are most  
17 likely to be subject to full disclosure or fuller  
18 disclosure.

19 THE COURT: On that point, you have identified, I  
20 think it is, somewhere in the neighborhood of 18 separate  
21 officials with respect to Request 1 and 20 or more with  
22 Request 2. I mean, one of the things that you might want to  
23 consider in your discussions is prioritizing those folks.  
24 Who do you really think are most likely to have responsive  
25 documents so that the burden on the agency is reduced?



1           MR. McGRATH: Yes, Your Honor. And to that  
2 point, at the time we drafted the request we had limited  
3 public available -- publicly available information about  
4 which officials would be most important to include, but we  
5 would --

6           THE COURT: And just to be clear --

7           MR. McGRATH: Yes.

8           THE COURT: -- the request came significantly  
9 before the whistle-blower report and public disclosure of  
10 the issue that's now subject -- that's driving the  
11 impeachment inquiry; is that correct?

12           MR. McGRATH: Well, the request came about a week  
13 after initial reports that were not fully confirmed that the  
14 President's personal attorney was going to travel to Ukraine  
15 to press the government there to investigate one of the  
16 President's political opponents, but there was certainly not  
17 fulsome reporting about those efforts at that time, and  
18 that's -- but at the same time we made an effort, based on  
19 guesswork, to determine the high-ranking officials who were  
20 most likely to have responsive communications.

21           I would also -- to the practicability concerns  
22 that Your Honor might have and that the State Department has  
23 made assertions regarding, we are willing to work to narrow  
24 in order to make production practicable, but we also -- it's  
25 our understanding, though we have little information from

1 State about the hits that it identified in its sur-reply,  
2 that because these are matters that have been covered  
3 extensively in the news, it is extremely likely, in our  
4 experience, that many, many publicly available news clips  
5 are generating hits to the extent search terms are being  
6 used across electronic records.

7 THE COURT: And you're not looking for news  
8 stories.

9 MR. McGRATH: No. And those also, having perhaps  
10 been a junior associate reviewing documents, can be marked  
11 nonresponsive very, very quickly, and we -- I think we need  
12 more information about what the pool of documents look like  
13 to understand whether those numbers represent a true burden  
14 or not.

15 And we also think that because we requested  
16 records reflecting communications here, including  
17 handwritten and hard copy documents, that custodial  
18 inquiries may be appropriate, and those can be limited to,  
19 like, the handful of senior officials who are likely to have  
20 such documents, but we're not clear on whether, in tasking  
21 out to these components, such inquiries have been  
22 undertaken.

23 THE COURT: Great. Thank you.

24 MR. McGRATH: Thank you, Your Honor.

25 THE COURT: Mr. Abbuhl, how are you?

1 MR. ABBUHL: I'm good, Your Honor. How are you?

2 THE COURT: Good.

3 So do you agree with me that it's more a matter of  
4 semantics as to whether this is decided on a PI or simply  
5 decided based on a production schedule that the Court could  
6 order in the normal course?

7 MR. ABBUHL: I think it's -- to the extent that  
8 the end result is the same, yes, it's a matter of semantics.  
9 We do think, as we laid out in our briefs, that the  
10 preliminary injunction factors are not met, but at the end  
11 of the day I think Your Honor is generally correct.

12 And I would also like to point out, Your Honor,  
13 that we, of course, agree with many of the things that the  
14 State Department said -- or, excuse me, that American  
15 Oversight said.

16 THE COURT: I would expect for you to agree with  
17 your client.

18 MR. ABBUHL: I do agree with everything, in fact,  
19 that the State Department said, but I would also say that  
20 the State Department agrees with American Oversight to the  
21 extent that this matter is, of course, of important public  
22 interest. We recognize that. We recognized that when we  
23 granted expedited processing. We realized and met the  
24 statutory definition of an urgent need to disseminate the  
25 information, and we're moving very expeditiously to do so,

1 including doing all these searches since last week to get  
2 you this information for the sur-reply.

3 THE COURT: Right. But --

4 MR. ABBUHL: I would also -- I'm sorry.

5 THE COURT: -- State has had the request for five  
6 months though.

7 MR. ABBUHL: You're correct, Your Honor, that the  
8 request --

9 THE COURT: Is that a longer-than-average time for  
10 State to have done, you know, the preliminary search that  
11 resulted in these reported results, which I've got to say  
12 are not terribly detailed, right?

13 MR. ABBUHL: You're right that they're not  
14 detailed, Your Honor, but I think we do have as much  
15 information as we can give you at this moment; and we're  
16 certainly proceeding, and we'll get you as much information  
17 as possible.

18 As to the timing, I think it's important to note  
19 that although the request came in five-ish months ago, that  
20 the request for expedition was only a matter of weeks, and  
21 as we laid out, you know, getting into the expedited  
22 process, that's, in fact, one of the grounds that American  
23 Oversight moved on --

24 THE COURT: Fair enough. Fair enough.

25 MR. ABBUHL: In the general context of this case

1 as well, Your Honor, I think it's important to note, in  
2 light of the extreme amount of interest in these documents  
3 and similar documents, that the State Department has  
4 actually now gotten 60 requests related to Ukraine since May  
5 1st.

6 THE COURT: Tell me about that. Where is American  
7 Oversight's Ukraine request in that queue? Are they the  
8 first one in?

9 MR. ABBUHL: I do not think they're the first to  
10 actually get into litigation about Ukraine. I do think they  
11 were toward the beginning of initial requests. I'm not  
12 exactly sure where they are and when their request for  
13 expedition was granted --

14 THE COURT: Okay.

15 MR. ABBUHL: -- but they are not the only ones who  
16 are in litigation.

17 THE COURT: Have any other cases been filed in  
18 this court; and if so, which judges are handling them?

19 MR. ABBUHL: Yes, Your Honor. I know of at least  
20 one that's actually brought by American Oversight against  
21 the State Department, and that's before Judge Berman  
22 Jackson. There may be others in this court, but --

23 THE COURT: Do you know how the requests here  
24 relate to the requests in that case?

25 MR. ABBUHL: I believe that the requests in the

1 case in front of Judge Berman Jackson do involve  
2 communications with Mr. Giuliani, but I believe the focus is  
3 on Mr. -- or, excuse me, Ambassador Volker, but I believe  
4 that there is quite a bit of overlap in that case, and we do  
5 think that, certainly for cases involving the Department of  
6 State, it would make sense to be in front of the same judge  
7 as a matter of efficiency.

8 THE COURT: Do you know which one was filed first?

9 MR. ABBUHL: I believe this one was filed first,  
10 Your Honor, but I would have to confirm that.

11 THE COURT: But the department didn't file a  
12 notice of related case?

13 MR. ABBUHL: We are happy --

14 THE COURT: I'm just asking.

15 MR. ABBUHL: We have not, Your Honor.

16 THE COURT: Okay. Apart from that American  
17 Oversight case, any other judges in this district dealing  
18 with similar Ukraine requests?

19 MR. ABBUHL: I know that there are at least six  
20 Ukraine-related cases in litigation, but as I look down I  
21 only have the docket numbers and not the district courts.  
22 But I'm happy to provide that information.

23 THE COURT: Okay. If you could give the Court --

24 MR. ABBUHL: Of course.

25 THE COURT: I mean, obviously State shouldn't be

1       responding piecemeal to six different requests that are in  
2       the same general time frame --

3               MR. ABBUHL: We certainly agree, Your Honor.

4               THE COURT: -- or at least there's an argument  
5       that could be made that State should not have to respond  
6       piecemeal.

7               MR. ABBUHL: Indeed, Your Honor.

8               And just for the Court's awareness, even last  
9       night I received another email from a different district --  
10      in a different district but of another -- the Protect  
11      Democracy Project informed us they're going to move for  
12      preliminary injunction, and I think it's just worth noting  
13      that if all 60 requests that have been received by the State  
14      Department so far were somehow brought forward on an  
15      emergency posture, that really would just not make sense for  
16      that emergency posture.

17              THE COURT: Okay. Respond to sort of the  
18      practicability concerns that I raised with the plaintiffs.  
19      Do you agree that it is unlikely that communications outside  
20      the department with a third party who is not some special  
21      government employee would not be exempt from disclosure?

22              MR. ABBUHL: With respect, Your Honor, we haven't  
23      been able to look at the documents at all, and I really  
24      cannot --

25              THE COURT: I'm not asking about specific

1 documents --

2 MR. ABBUHL: Sure.

3 THE COURT: -- but am I wrong that -- I can't  
4 think of an exemption. Can you?

5 MR. ABBUHL: We really can't speculate. I mean,  
6 there could be privacy information, but we really just are  
7 not in a position to speculate about what exemptions may or  
8 may not apply without seeing the documents.

9 THE COURT: All right. Well, you see where I'm  
10 going.

11 MR. ABBUHL: Yes.

12 THE COURT: You can influence where I'm going or  
13 you can choose not to, right?

14 MR. ABBUHL: Your Honor, the department -- because  
15 this was brought on an emergency motion, we have not been  
16 asked to meet and confer. We've not been asked to  
17 prioritize any set of documents. The department does, you  
18 know --

19 THE COURT: Let me come at it the other way. Do  
20 you foresee that there are any documents that would almost  
21 certainly be withheld based on a valid exemption such that  
22 the plaintiffs have not shown irreparable harm from any  
23 delay in processing them?

24 MR. ABBUHL: As Your Honor pointed out, diplomatic  
25 cables are one example of a class of documents that are



1       likely to be exempt.

2               THE COURT:   Do any others come to mind?

3               MR. ABBUHL:   Your Honor, I must emphasize the  
4       earliness of this, and I cannot say to the -- I really am  
5       not in a place to speculate about these -- the potential  
6       exemptions until we look at them, and we wouldn't want to  
7       tie ourselves down in that way.

8               But we are moving as expeditiously as possible.  
9       We've begun ingesting the documents.   The search is ongoing,  
10      and we recognize the strong interest in getting this out  
11      quickly.

12              THE COURT:   Okay.   So the department takes the  
13      position that its obligation, once expedited processing has  
14      been granted, is to process the documents as soon as  
15      practicable.

16              MR. ABBUHL:   That's correct.

17              THE COURT:   Now, I just read the *Judicial Watch v.*  
18      *DHS* case that was before the Circuit earlier this year or  
19      late last year, and it takes a somewhat different tack that  
20      says the violation is failure to comply with the statutory  
21      deadlines and to thereafter produce documents or process  
22      documents promptly, which the Circuit categorized as  
23      generally being days or a few weeks within that 20- or 30-  
24      day determination, all right.   How do you square your  
25      position of being obligated simply to do it whenever it's

1 practicable versus the Circuit's position in that case?

2 MR. ABBUHL: I don't necessarily think there needs  
3 to be much daylight between "prompt" and "as soon as  
4 practicable," and it will depend inevitably on the actual  
5 context of the --

6 THE COURT: Well, if "as soon as practicable" only  
7 triggers when you grant expedited processing, and "prompt"  
8 applies in the normal nonexpedited case, wouldn't that  
9 suggest that "as soon as practicable" is more quickly than  
10 "prompt"?

11 MR. ABBUHL: I don't know if I could read it that  
12 way, Your Honor. As we pointed out in our briefs, numerous  
13 cases have mentioned that the failure to give a  
14 determination within the standard strategy time frames is  
15 essentially an exhaustion requirement.

16 THE COURT: Right.

17 MR. ABBUHL: But I do agree with Your Honor --

18 THE COURT: And I agreed with you, but the  
19 Circuit -- at least the two members of the majority on that  
20 panel -- thought differently, correct?

21 MR. ABBUHL: Your Honor, I don't believe that the  
22 panel would have said that regardless of the scope of the  
23 request and regardless of the resources available to the  
24 agency at issue that it would be within a matter of weeks.  
25 I mean, it just is an impracticable impossibility. And the

1 State Department does have extremely limited resources, and  
2 the request here could be voluminous. We don't know the  
3 total extent yet, but we are, again, going as quickly as  
4 possible and fully recognize the important public interest  
5 here.

6 THE COURT: Remind me of what rate the department  
7 was ordered to process documents related to former Secretary  
8 Clinton's emails.

9 MR. ABBUHL: There were numerous cases, Your  
10 Honor. I believe that --

11 THE COURT: Judge Contreras had the main case.

12 MR. ABBUHL: I think that's right, Your Honor, and  
13 I think, if memory serves, he -- there was a total universe  
14 of documents, and it wasn't a number per month but a  
15 percentage of that universe. But I think it ended up  
16 working out to be in the thousands per month, Your Honor.

17 THE COURT: Do you remember how many thousands per  
18 month?

19 MR. ABBUHL: I believe it was between 5,000 and  
20 10,000, but I do not know. I know the Khashoggi case, which  
21 is currently ongoing, is 5,000 per month, but that has  
22 resulted in the department having to take five FOIA  
23 reviewers off lines from all of the requests.

24 THE COURT: And who has the Khashoggi case?

25 MR. ABBUHL: That's out of the Southern District

1 of New York.

2 THE COURT: Can you tell me whether the department  
3 has begun to search for documents in response to the various  
4 congressional subpoenas?

5 MR. ABBUHL: All I know, Your Honor, is that is  
6 being treated differently than the FOIA request, and we  
7 fully --

8 THE COURT: But you would agree that there's  
9 substantial overlap?

10 MR. ABBUHL: We think it's a fair characterization  
11 to say that the documents requested here are a subset of the  
12 documents that are -- of the subpoena.

13 THE COURT: And there's been no commitment to  
14 actually produce documents in response to the congressional  
15 subpoena; is that correct?

16 MR. ABBUHL: Your Honor, all I know for now is  
17 they are being treated separately, though I do have with me  
18 Elizabeth Shapiro, who, if you have further questions on the  
19 subpoena, I would be happy to let her discuss them more.

20 THE COURT: Ms. Shapiro, anything to add on the  
21 subpoena? And as I stated on the scheduling call the other  
22 day, I mean, it's potentially relevant -- if documents that  
23 Congress obtains eventually come to light, that is relevant  
24 to the plaintiff's irreparable harm argument here.

25 MS. SHAPIRO: I understand, Your Honor. There's

1 not a lot of information to provide. The congressional  
2 subpoena process happens on a separate track and is subject  
3 to accommodation procedures. It's not the same sort of FOIA  
4 application of redactions or anything like that. It's a  
5 process between Congress and the State Department.

6 I think, you know, we would suggest that the Court  
7 sort of not take into account what happens on the subpoena  
8 front and sort of just assume that the FOIA case stands  
9 alone.

10 THE COURT: Yes. I'm approaching it more from a  
11 practicable perspective.

12 MS. SHAPIRO: Understood.

13 THE COURT: You know, are we going to really  
14 search the same email -- custodians' same email systems  
15 twice? And what I'm hearing is the answer is probably yes,  
16 or may be yes.

17 MS. SHAPIRO: Well, I think the issue is that we  
18 just can't assume what happens on that other track, and so  
19 it's probably not practical to take into account what  
20 happens during the accommodation process.

21 THE COURT: Very well.

22 MS. SHAPIRO: Thanks.

23 THE COURT: Thank you.

24 All right. That's all I have. Anything else from  
25 the plaintiffs?

1           MR. McGRATH: Yes, if I may, Your Honor? There  
2           are just a few points that I'd like to address.

3           First, to Your Honor's question about other  
4           litigations in this district, American Oversight did file a  
5           separate lawsuit for Mr. Volker's communications. They are  
6           similar. The requests themselves are worded similarly. We  
7           did not include that in this lawsuit partly because those  
8           requests were filed significantly later, in August and early  
9           September, based on public reporting --

10          THE COURT: Is --

11          MR. McGRATH: -- and also because Ambassador  
12          Volker, after leaving the State Department, turned over  
13          communications that he had to Congress which were then made  
14          public; which there may be other communications there, but  
15          perhaps irreparable harm in that case is lessened by his  
16          cooperation with Congress in turning over those records.

17          THE COURT: Okay. So you didn't relate that case.

18          MR. McGRATH: No.

19          THE COURT: And your view is that it's not related  
20          because it's a more limited request and different documents.

21          MR. McGRATH: And he was in a separate office from  
22          the custodians that we've listed here and separate  
23          components from them. He was, I believe, a special  
24          representative for Ukraine negotiations --

25          THE COURT: Okay.

1           MR. McGRATH:  -- and wasn't in any of the offices  
2           we've requested here.

3           Also, to the practicability point here, as we  
4           pointed out in our briefs, the State Department is a very  
5           large department with -- I think we found publicly available  
6           information suggesting there were 69,000 employees, and it's  
7           plaintiff's position that for a matter of such urgent  
8           national concern that a few people being allocated to  
9           process these requests rapidly enough to prevent irreparable  
10          harm to the public is practicable.

11          And we also -- to the irreparable harm point,  
12          based on the representations here and also the publicly  
13          available information we have found, it appears as though  
14          the administration will refuse to comply with Congress's  
15          subpoenas for overlapping documents at issue here, and, as a  
16          result, Congress is likely to be unable to, even if it wants  
17          to, make those public and allow the public to make informed  
18          decisions about how they can lobby their elected  
19          representatives in Congress.

20          And further, as opposing counsel mentioned, the  
21          accommodations process between the branches may result in  
22          documents being turned over, but those documents may be  
23          turned over on the condition of confidentiality, and thus  
24          Congress may get access to the documents but the public may  
25          not get access to the documents.  So we think that there's

1 clearly a high likelihood of irreparable harm here if these  
2 records are not made public very promptly.

3 THE COURT: Okay. As my questions probably  
4 suggested, I am generally skeptical of preliminary  
5 injunction requests in FOIA cases, and -- but that said,  
6 whether I grant the preliminary injunction or simply  
7 exercise the Court's oversight authority as I would in any  
8 other FOIA case, considering the equities on both sides, I  
9 agree with the plaintiffs that these are documents and  
10 records of critical importance that will inform, obviously,  
11 a rare and important process. And so I want you all to get  
12 together and figure out ways to narrow the request so that  
13 the documents that the plaintiffs believe are least likely  
14 to be subject to a valid withholding can be searched and  
15 processed over the next 30 days and produced over the next  
16 30 days.

17 And there are several ways that you all can work  
18 together to do that, and I will trust that you will do so in  
19 good faith. And if you need my, you know, involvement, I'm  
20 happy to resolve any differences that may come up, but we'll  
21 issue an order with some time periods and, you know, some  
22 more specific instructions. But the bottom line is that,  
23 you know, I think it's important for these documents, to the  
24 extent they are subject to FOIA and not subject to any  
25 exceptions, be disclosed.



1 I'm also, at the same time, concerned with the  
2 intersection between this case and other cases so I think I  
3 want a status report that gives me a little better sense of  
4 whether State will be prejudiced by compliance with other  
5 specific requests in the same time period.

6 I mean, we will craft an appropriate minute order  
7 or paper order to give you folks some more guidance, but the  
8 bottom line is that either in connection with this case or  
9 in conjunction with other cases, we need to get a production  
10 completed within the next 30 days so that it can inform the  
11 public's knowledge about the ongoing impeachment process,  
12 okay?

13 MR. McGRATH: Thank you, Your Honor.

14 THE COURT: Anything from the government?

15 MR. ABBUHL: Nothing further, Your Honor.

16 THE COURT: Okay. Thank you, folks. And let's go  
17 Nats.

18 (Whereupon the hearing was  
19 concluded at 1:50 p.m.)  
20  
21  
22  
23  
24  
25

**CERTIFICATE OF OFFICIAL COURT REPORTER**

I, LISA A. MOREIRA, RDR, CRR, do hereby  
certify that the above and foregoing constitutes a true and  
accurate transcript of my stenographic notes and is a full,  
true and complete transcript of the proceedings to the best  
of my ability.

Dated this 24th day of October, 2019.

/s/Lisa A. Moreira, RDR, CRR  
Official Court Reporter  
United States Courthouse  
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Washington, DC 20001